Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1008

WILLIAM CAHALAN,

Petitioner,

vs.

LEE DELL WALKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's brief misstates the nature of the legal issue sought to be reviewed. The issue is whether, *under Michigan Law,* the Defendant prosecutor had an absolute privilege to allege and disseminate to the News Media that the respondent was guilty of murder when there was no valid conviction or pending criminal proceeding against the Respondent.

STATEMENT OF CASE

Respondent takes exception to the slanted factual presentment contained in the Petitioner's brief and relies upon the factual statement contained in the Opinion of the United States Court of Appeals for the Sixth Circuit.

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ARGUMENT

Preliminarily, it must be clearly indicated that the basis of Respondent's claim is not that Petitioner sent his letter of September 19, 1974, to the members of the legislative committee but that this letter was indiscriminately disseminated to the general public through the news media.

In his ruling, the district court Judge apparently was relying on the absolute privilege expressed in *Barr v. Mateo,* 360 U. S. 564, 79 S. Ct. 1335 (1959), as he theorized along the lines enunciated in *Barr* [Petitioner's Brief Appendix C, p. 24]. Respondent respectfully submits that the actions of Petitioner were not encompassed within *Barr's* absolute immunity. In *Barr,* this Court held that the press release of the defendant, which defended his *own* integrity from *direct* charges—though a "close" question was "within the outer perimeter of petitioner's line of duty. . . ." 360 U. S. 564, 574-575, 79 S. Ct. 1335-1341 (1959). Here, Petitioner was not acting within the "outer perimeter of his line of duty. . . ." His capacity was inextricably connected with the prosecutorial system. It is

not within his realm of authority—legally or morally—to publicly villify as criminals those citizens he believes cannot be convicted in a court of law. Senate Bill 1050 cannot, by any stretch of the imagination, be considered an attack upon Cahalan individually. Nor, indeed, could the Bill be characterized as an attack upon the prosecutorial system. In fact the Bill omitted any reference to police or prosecutorial misconduct concerning Walker's coerced confession.

Moreover, the district court was obliged to follow Michigan law on this question as *Barr* was not limited to the liability of Federal Officials. *Barr v. Mateo, supra,* at 565, *supra,* at 1336. *See Erie R. R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed 118 (1936). The Michigan case law, in contrast to *Barr,* would not provide immunity to Cahalan. *Madill v. Currie,* 168 Mich. 546, 134 N. W. 1004 (1912); *Brunn v. Weiss,* 32 Mich. App. 428, 188 N. W. 2d 904, 905 (1971) ("The publication of a newsletter may be closely enough related to the official duties of the board members to give them a conditional privilege, but there is no absolute privilege").

A recent decision by the Michigan Court of Appeals, which conveniently was omitted from the selective review of "Michigan Law" contained in Petitioner's brief, is *Tocco v. Piersante,* 69 Mich. App. 616, 245 N. W. 2d 356 (1976). This case directly refutes the Petitioner's claim that the U. S. Court of Appeals for the Sixth Circuit misconstrued state law. In *Tocco,* the Court, following a review of Michigan precedent, held that a high official in the State Attorney General's Office was entitled to qualified, and not absolute, privilege in a defamation action not

arising out of judicial action. Given only a qualified privilege, the court reversed the lower court's grant of summary judgment. Clearly, *Tocco,* with its direct analogy to the instant case, mandates rejection of Petitioner's Writ. See also, *Stewart v. Troutt,* (Mich. Ct. of Appeals, No. 26246, Jan. 17, 1977) (absolute privilege only when councilman undertaking official duties).

Absolute immunity would only attach to the Petitioner if he acted within the scope of a judicial proceeding. *Bauers v. Heisel,* 361 F. 2d 581, 589 (3d Cir. 1966), which was adopted by the Michigan Courts in *Blass v. Williams,* 15 Mich. App. 228, 166 N. W. 2d 520 (1969), provides the relevant framework:

> "In deciding the question of whether a prosecuting attorney is liable for acts done in his official capacity, we must decide whether his duties are *sufficiently judicial* as to cloak him with the same immunity afforded judges or are so closely related to those duties of law enforcement officials as to amerce him with potential civil liability for his imprudent actions.
>
> "The rationale is set forth in Yaselli v. Goff (CA 2, 1926), 12 F. 2d 396, 406:
>
> "'• • • The public interest requires that persons occupying such important positions and so closely identified with the *judicial departments* of the government should speak and act freely and fearlessly in the discharge of their important official functions. • • •" (Emphasis added.)

The emphasis on "sufficiently judicial" and "judicial departments" indicates that only where the prosecutorial conduct is *within the judicial process* does the doctrine of judicial immunity apply. Hence once the judicial process had been terminated by the entry of the order of nolle

prosequi, the doctrine of judicial immunity was rendered inapplicable. Consequently, the United States Court of Appeals for the Sixth Circuit properly applied Michigan Law.

———o———

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court should deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: March 21, 1977